No. 82-1139

IN THE

Supreme Court of the United States

October Term, 1982

FORD MOTOR COMPANY, a Corporation,

Petitioner,

vs.

JAMES M. HASSON, a Minor, by and through his Guardian *ad Litem* JACK M. HASSON, and JACK M. HASSON, Individually,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents James M. Hasson and Jack M. Hasson hereby oppose the Petition for Writ of Certiorari of Ford Motor Company seeking review of the opinion of the California Supreme Court. That opinion is reported at 32 Cal.3d 388 and is reproduced as Appendix A to Ford's Petition.

The decision below gave full consideration to Ford's original state claim of jury misconduct and correctly decided that the undefined, occasional and entirely neutral inattentiveness of several jurors during this extremely lengthy trial did not prejudice Ford's right to a fair trial. Ford now attempts to elevate this state issue into a federal constitutional question lacking precedent or legitimacy.

Ford's Petition should be denied because (1) the issue Ford now raises was not presented in the state courts in a

timely manner, (2) it presents no substantial federal question, (3) it is based upon an overstatement and misstatement of the facts, and (4) it attempts to stand existing constitutional doctrine on its head by creating and imposing on state court civil trials an unprecedented and unmanageable new constitutional standard under which virtually any jury inattentiveness, no matter how inconsequential or neutral, would automatically be deemed prejudicial and require a new trial. If implemented, such a rule would simultaneously bring both our overburdened federal courts and our overburdened state courts to their knees.

QUESTIONS PRESENTED.

1. May Ford seek review of a purported federal question which was fully ripe in the state trial court but was raised for the first time only on petition for rehearing following decision by the state supreme court?

2. Where a state trial court and the state court of last resort have, after an examination of the entire record, determined that occasional, undefined, and neutral juror inattentiveness during the course of a lengthy trial did not prejudice Ford's right to a fair trial, does federal due process require that Ford be granted a new trial nonetheless?

STATEMENT OF THE CASE.

A. The Underlying Facts.

In July of 1970, James Hasson, then a college student, suffered massive brain damage in an automobile accident caused by a defective braking system in a 1966 Continental, a vehicle manufactured by Ford. He sued Ford on theories of negligence and strict liability. The case was first tried in 1973 and resulted in a judgment in his favor. The California Supreme Court found the evidence against Ford sufficient to sustain the judgment, but reversed solely on the

ground that the trial court failed to instruct on contributory negligence (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 138 Cal.Rptr. 705, 564 P.2d 857). The case was tried a second time in 1978 on theories of negligence and strict liability. The trial lasted three months, involved fifty witnesses and generated a Reporter's Transcript of almost 6,000 pages. Ford virtually abandoned the contributory negligence theory, conceding it had no credible evidence of negligence by James Hasson. James Hasson presented an overwhelming case of liability at the second trial, and judgment was once again entered in his favor.

B. The Jury Misconduct Issue.

On motion for new trial, Ford introduced declarations by several jurors to the effect that certain other jurors had been observed during trial doing crossword puzzles and that one had been observed reading a novel. The declarations gave no clue as to when, how frequently, or for what duration these acts allegedly occurred.[1] Further they gave no clue whether these acts occurred during Plaintiffs' presentation or during Defendant's presentation, whether at the end of prolonged and extremely repetitious sessions of cross-examination, or during frequent and lengthy interruptions in testimony. Counterdeclarations were offered by Plaintiffs in which the accused jurors (a) specifically denied they did not pay attention to the testimony and (b) specifically asserted that they did pay attention to all of the testimony.[2]

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[1]Ford's statement (page 9) that "It was plainly proved that during the trial of this case, five of the twelve jurors for an extended period of days or weeks secretly tuned out some or all of the proceedings in favor of indulging in private amusements . . ." and other similar statements misrepresent the record. They are sheer fiction.

[2]Ford objected to these counterdeclarations on the ground that they impermissibly described the mental processes of the jurors, and the California Supreme Court ultimately held them inadmissible on this ground.

Similarly, a second declaration by one of the accusing jurors was offered by Plaintiffs in which he stated "I believe that all of the jurors were honest in listening to the evidence, and I have not intended to indicate that any juror who was reading or working on a crossword puzzle was not honestly listening to and hearing and evaluating the evidence presented . . ." and that "I believe that all jurors, including myself, gave the case of *Hasson v. Ford* an honest and conscientious treatment throughout."[3]

In denying Ford's motion for new trial on grounds of juror misconduct, the trial court specifically found ". . . that there was no improprieties on the part of the jurors, individually, which would warrant the granting of such a motion." (R.T. 5938).

THE OPINION OF THE CALIFORNIA SUPREME COURT.

The California Supreme Court affirmed ". . . the basic premise that a jury's failure to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party" (Appendix A to Petition for Writ of Certiorari, pp. 20-21), but noted that "not a single case has been brought to our attention which granted a new trial" on the grounds of jury inattentiveness, and it cited a legion of cases in which courts in our various jurisdictions have declined to grant a new trial on such grounds. (Appendix A, pp. 21-22).

Turning to the facts of this case, the California Supreme Court concluded that Ford's declarations constituted a prima facie showing of juror misconduct. The Court also concluded that since Plaintiffs' counterdeclarations concerned the mental processes of the jurors, they were inadmissible

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[3]Ford likewise objected to this declaration and it was likewise held inadmissible by the California Supreme Court. (See fn. 2, *supra*.)

under Section 1150 of the California Evidence Code, which left Ford's allegations unrebutted. (Appendix A, pp. 22-26.) This did not end the matter, however, "because a new trial is required only if it can be established that Ford was somehow prejudiced by the jurors' inattentiveness." (Appendix A, pp. 26-27.)

Concerning Ford's claim of prejudice, the California Supreme Court stated: "On these facts, there is but the flimsiest evidence of actual prejudice to Ford. Only if we can infer from the bare fact of the jurors' diverting activities that they had prejudged the outcome of the case and closed their minds to further consideration of the evidence can it be said that actual prejudice occurred. Such an inference of partiality would be patently unwarranted on this record." (Appendix A, p. 27.)

Nonetheless, the California Supreme Court indicated, Ford was entitled to the benefit of a presumption of prejudice, which presumption might be rebutted either by an affirmative showing that no prejudice existed or "by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party." (Appendix A, pp. 27-29.)

The Supreme Court continued at Appendix A, page 29:

> "Here the jurors engaged in essentially neutral, albeit distracting, activities at unspecified times during the presentation of evidence. There was overwhelming proof of liability against Ford and no substantial likelihood that actual prejudice may have resulted from the jurors' activities. It was not clear what type of evidence was being presented while the misconduct occurred or even which side's case was being presented. In sum, the showing of misconduct is rebutted by an examination of the record which reveals no substantial likelihood that Ford was given anything less than a full and fair consideration of its case by an impartial jury."

The Court continued at page 30:

> "Even the most diligent juror may reach the end of his attention span at some point during a trial and allow his mind to wander temporarily from the matter at hand. We do not condone such conduct and trust the trial courts will be alert to take appropriate action if it occurs. But we recognize that this is especially likely to occur in such a complex and lengthy trial as the case at bar. Retrials are to be avoided unless necessitated by a more substantial dereliction of jurors' duties than was evident in this case. 'Society has a manifest interest in avoiding needless retrials: They cause hardships to the litigants, delay to the administration of justice, and result in a social and economic waste.' "

In sum, although it appears that no state court has ever reversed a civil verdict on the grounds of jury inattentiveness, Ford now asks this Court to declare and enforce against the states a drastic and unworkable new rule requiring reversal of *all* civil verdicts on this ground, including cases in which the state trial and appellate courts determine in light of the entire record that the losing litigant has not been prejudiced. The mere statement of what Ford requests belies its legitimacy. Moreover, born of desperation, it comes too late.

REASONS FOR DENYING THE WRIT.

A. The Federal Issues Presented in This Court Were Not Timely Raised in the State Courts. As a Consequence, Ford's Petition Is Jurisdictionally Defective.

This Court has repeatedly held that it is without jurisdiction to review federal claims on certiorari when the petitioner has failed to raise those claims at the proper time in the state courts. (*Hathorn v. Lovorn* (1982) ___ U.S. ___, 72 L.Ed.2d 824, 832; *Radio Station WOW, Inc. v. Johnson* (1944) 326 U.S. 120, 128; *CIO v. McAdory* (1944) 325 U.S. 472, 477; *Pennsylvania Railroad Co. v. Illinois Brick Co.* (1935) 297 U.S. 447, 463; see also Annotation (1970) 24 L.Ed.2d 837, 845-849.) The proper time to raise the question in the state courts is generally a matter for state law, and any failure to follow state procedure should be fatal to the petitioner's chances for review by this Court. (*In re Lamkin* (1957) 355 U.S. 59; *Ferguson v. Georgia* (1961) 365 U.S. 570, 572, n. 1.)

California requires that on appeal the appellant present all of his points in his *opening* brief in the Court of Appeal. Even points raised for the first time in the reply brief will not be considered, absent a good excuse for failure to present them before. (*In re Marriage of Millet* (1974) 41 Cal.App.3d 729, 732, 116 Cal.Rptr. 390; *Crowder v. Lyle* (1964) 225 Cal.App.2d 439, 450, 37 Cal.Rptr. 343.) *A fortiori*, a point raised in a petition for rehearing following decision in the California Supreme Court comes too late. (*A. F. Estabrook Co. v. Industrial Acc. Comm.* (1918) 177 Cal. 767, 771, 177 Pac. 848; *In re Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 381, 177 Cal.Rptr. 380; *People v. Blevins* (1964) 222 Cal.App.2d 801, 805, 35 Cal.Rptr. 438, 36 Cal.Rptr. 191, cert. den. 377 U.S. 913; 6 Witkin, Cal.Proc.2d

Appeal, §598, p. 4526.) Federal law is in complete agreement with California's rule. (*Radio Station WOW, Inc. v. Johnson, supra*, 326 U.S. 120, 128; *Herndon v. Georgia* (1935) 295 U.S. 441, 443.)

There can be no question that in this case Ford has failed to raise its federal issue in a timely fashion and that its Petition for Writ of Certiorari is therefore jurisdictionally dfective. Ford could have raised the purported federal issue it now asserts in the trial court when it moved for a new trial. All of the facts were then known to it, and federal standards, if applicable at all, were no less applicable at that level than at higher levels of the California judicial system. The facts are as follows:

1. As noted, Ford claimed jury misconduct in the trial court on motion for new trial. But Ford did not assert any federal constitutional issue, Ford did not seek an evidentiary hearing on the issue of prejudice, and Ford did not assert any purported federal constitutional burden of proof on the issue of prejudice.[4]

2. In the California Court of Appeal, Ford successfully pursued the same position it took in the trial court. Not only did Ford fail to raise the purported federal constitutional issue it now presents, but it continued to assert a position incompatible therewith.

3. Only on Petition for Rehearing *after* decision by the California Supreme Court did Ford for the first time attempt

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[4]Quite the contrary, Ford took a position incompatible with the purported federal issue it now raises. Ford asserted that the juror inattentiveness carried with it under *state* law an automatic presumption of prejudice, and Ford resisted and moved to strike Plaintiffs' declarations showing no prejudice occurred, invoking California Evidence Code §1150 in support of its position. Thus, Ford successfully resisted precisely the kind of hearing to which it now claims it is constitutionally entitled.

to identify the purported federal constitutional question it now raises.

Under the authorities cited above, this attempt to assert the issue comes too late.

B. No Violation of Ford's Due Process Rights Has Been Shown.

1. Ford Obtained a Fair Jury Trial and Fair Determination of Its Jury Misconduct Contention in the State Courts.

The thrust of Ford's argument in this Court is that since it made a prima facie showing of juror misconduct, since it was entitled to the benefit of a rebuttable presumption of prejudice under California law and since Plaintiffs' juror affidavits showing no prejudice were held inadmissible, the California Supreme Court was compelled to reverse the judgment. When the California Supreme Court declined to do so, this issue of state law suddenly assumed a federal dimension; it violated Ford's due process rights under the Fourteenth Amendment.

Ford's argument is premised on a view of the facts and the law which is hopelessly slanted, misleading and ultimately inaccurate.

First, the record utterly belies Ford's exaggerated and fictionalized version of certain jurors' inattentiveness. The California Supreme Court has fairly characterized the juror declarations, Ford has not.[5]

2. A second false notion evidenced in Ford's argument is that Ford was somehow unfairly hampered in its efforts to show prejudicial juror misconduct by rules of California law, which preclude a disappointed litigant from compelling

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[5]Moreover, since several jurors freely gave Ford declarations, the weakness in Ford's case reflects the absence of prejudicial misconduct, rather than Ford's inability to prove it.

the testimony of jurors suspected of misconduct (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 134 Cal.Rptr. 813, 557 P.2d 104) and which exclude evidence of the subjective mental processes of jurors (Cal. Evid. Code, §1150). But it was *Ford* which successfully kept out *Plaintiffs'* declarations showing there was neither misconduct nor prejudice, not the other way around, so Ford is hardly in a position to complain. Moreover, the right of the states to adopt such reasonable rules as those just mentioned has not, to our knowledge, been called into question in any decision of this or any other court. Indeed, the federal rule forbidding proof of mental processes but allowing proof of overt conduct is remarkably similar to that followed in California (see Federal Rules of Evidence, Rule 606(b); *Government of Virgin Islands v. Gereau* (CA3d, 1975) 523 F.2d 140, 149, cert. den. 96 S.Ct. 1119; *United States v. Green* (CA2d, 1975) 523 F.2d 229, 235) and is based on essentially identical reasons.

3. Another false premise pressed by Ford is that the presumption of prejudice recognized under California law automatically requires reversal upon *any* showing of juror misconduct, no matter how weak the showing, no matter how trivial or inconsequential the misconduct. Far from being compelled to apply so mindless and mechanical a rule, California courts are under the constitutional duty to examine the prejudicial effect of error or misconduct in light of the entire record, precisely as the California Supreme Court did here (Cal. Const. Art. VI, §13). Where, as here, the record discloses that the evidence overwhelmingly favors the prevailing party and the error or misconduct is on its face trivial, so that it can be said that the judgment is clearly right, prejudice is absent. (See, *e.g.*, *Alarid v. Vanier* (1958) 50 Cal.2d 617, 625, 327 P.2d 897; *Vasquez v. Alameda* (1958) 49 Cal.2d 674, 676, 321 P.2d 1.) This same

commonsense principle is applied in determining whether alleged juror misconduct was prejudicial. (*People v. Phillips* (1981) 122 Cal.App.3d 69, 175 Cal.Rptr. 703; *People v. Bullwinkle* (1980) 105 Cal.App.3d 82, 164 Cal.Rptr. 163; *People v. Martinez* (1978) 82 Cal.App.3d 1, 147 Cal.Rptr. 208.)[6]

2. Federal Jury Misconduct Standards Are Not Applicable to State Proceedings Under the Due Process Clause of the Fourteenth Amendment. Even if They Were, They Would Not Require a Different Result Here.

No decision of this Court has ever declared that the Seventh Amendment right to trial by jury in civil cases in federal courts is applicable to the states through the due process clause of the Fourteenth Amendment. Indeed, the authority on the point is uniformly to the effect that the Federal Constitution does *not* entitle a civil litigant in a state court a right to trial by jury (*Colgrove v. Battin* (1973) 413 U.S. 149, 169, n. 4 [dissenting opinion of Marshall, J.]; *Fay v. New York* (1947) 332 U.S. 261; *New York Central R. Co. v. White* (1917) 243 U.S. 188, 208; *Walker v. Souvinet* (1876) 92 U.S. 90), and *a fortiori* the rules developed under the Sixth and Seventh Amendments do *not* control the procedures used by the state courts in administering their jury systems in civil cases.

None of the cases cited by Ford apply federal constitutional standards to state civil juries, and all of them fall into two or three readily identifiable classes which bear no resemblance to this case and which involve issues very different from those involved here. Virtually all of the cases are criminal or quasi-criminal in nature, and thus involve

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[6]Ford's attempts to distinguish these cases is utterly spurious. In each, the weighing of the prejudicial effect of the illicit evidence involved precisely the process followed by the California Supreme Court in this case.

the higher degree of solicitude traditionally extended to criminal defendants. Many involve juror or judicial misconduct or extraneous influence so egregious and so inimical to unbiased determination of the issues as on its face to constitute a violation of due process. (See, *e.g.*, *Smith v. Phillips* (1982) 455 U.S. 209 [juror applied for employment in prosecutor's office during criminal trial]; *Gibson v. Berryhill* (1973) 411 U.S. 564 [quasi-judicial trier of fact decided issue in which it had a substantial pecuniary interest]; *Ward v. Village of Monroeville* (1972) 409 U.S. 57 [same]; *Tumey v. Ohio* (1927) 273 U.S. 510 [same]; *Remmer v. United States* (1954) 347 U.S. 227 [attempt to bribe juror]; *United States v. Harry Barfield Co.* (CA5th, 1966) 359 F.2d 120 [officer of plaintiff in tax refund action conversed with jurors about friendship between jurors and officer's family]; *Paramount Film Distributing Corp. v. Applebaum* (CA5th, 1954) 217 F.2d 101 [hometown jury bombarded with extraneous influences]; *Stiles v. Laurie* (CA6th, 1954) 211 F.2d 188 [juror brought evidence directly relevant to crucial issue into jury room and other jurors examined and discussed it].) Many do not involve claims of juror misconduct at all. (See, *e.g.*, *Estes v. Texas* (1965) 381 U.S. 532 [televising of trial might distract jury];[7] *In re Japanese Electronic Products Antitrust Lit.* (CA3d, 1980) 631 F.2d 1069 [issues too complicated to be tried to a jury]; *Drause v. Rhodes* (CA6th, 1977) 570 F.2d 563 [threats to juror's life]; *United States v. Gay* (CA6th, 1975) 522 F.2d 429 [court improperly excused jurors from further duty out of presence of and without consultation with counsel]; *Citron v. Aro Corporation* (CA3d, 1967) 377 F.2d 750 [multiple and lengthy recesses in complicated case resulted in jury's

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[7]*Estes* has been severely limited in *Chandler v. Florida* (1981) 449 U.S. 560.

not remembering all of evidence]; *Eckstein v. Kirby* (1978, E.D. Ark.) 452 F.Supp. 1235 [deaf person properly excluded as juror].) These cases offer no basis whatever for any rule applicable to this case, even if cases decided under the Sixth and Seventh Amendments were controlling, as plainly they are not.

CONCLUSION.

For the reasons above stated, the Petition for Writ of Certiorari of Ford Motor Company should be denied.

Respectfully submitted,

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